

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2010-027213

02/18/2016

HON. RANDALL H. WARNER

CLERK OF THE COURT  
K. Ballard  
Deputy

ABEL COMMERCIAL VENTURES L L C, et al. CLIFFORD J ROTH

v.

B M O HARRIS BANK, et al.

JACOB A MASKOVICH

SHELTON L FREEMAN  
ROBERT P SIMBRO  
PHILIP B WHITAKER

UNDER ADVISEMENT RULING

Plaintiffs' Motion for Stay of Enforcement of Judgments Pending Appeal Without Supersedeas Bonds is under advisement following an evidentiary hearing. The issue is whether Plaintiffs are "intentionally dissipating assets outside the ordinary course of business to avoid payment of" BMO's judgment for attorneys' fees. A.R.S. § 12-2108(B); ARCAP 7(a)(5)(A). If BMO proves that they are, the court may require Plaintiffs "to post a [supersedeas] bond in an amount up to the full amount of the judgment" in order to stay its execution. A.R.S. § 12-2108(B).

BMO has met this burden. The court finds the following by clear and convincing evidence.

Plaintiffs Abel and Wigwam were essentially single-asset entities, each created for the purpose of investing in a parcel of real estate. BMO's predecessor lent money to Abel and Wigwam secured by those parcels. BMO ultimately sold the loans to Southwest Next, which foreclosed. For purposes of this order, the court refers to the Southwest Next Defendants collectively as Southwest Next.

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Abel and Wigwam sued Southwest Next and BMO, alleging fraud. By the time those lawsuits approached trial in mid-2015, Abel and Wigwam owned no real property. Their only significant assets were their claims in this lawsuit. Shortly before trial, the court granted summary judgment for BMO and denied it for Southwest Next.

Then, with a jury trial looming, Plaintiffs and Southwest Next settled. At that time, BMO had not yet filed its fee application, but Plaintiffs knew it was forthcoming and knew it would be substantial. Under the terms of the settlement, Abel and Wigwam released what was at that time their primary asset: a legal claim against Southwest Next that sought seven figure damages and was about to go to trial. In return, Abel and Wigwam received releases. But their owners also received consideration. As part of the settlement, Plaintiffs' owners received a valuable asset from one of Southwest Next's principals.

The court finds that the asset Plaintiffs' owners received had substantial value to them. And it finds that Mr. Howard was willing to part with that asset only because he received a litigation release in return.

Plaintiffs characterize their settlement with Southwest Next as a "walk-away" whereby they and Southwest Next simply gave mutual releases. But that does not explain the transfer of property that was part and parcel of the same transaction. That transfer was in partial consideration for releasing claims against Southwest Next. And the transfer was not to Plaintiffs themselves, which would have left them with an asset from which to collect on BMO's judgment, but to related entities who are not party to this lawsuit.

The court finds that the structure of this transaction was designed, at least in part, to prevent Abel and Wigwam from having assets that could be reached to satisfy an attorneys' fees judgment. Abel and Wigwam intentionally dissipated significant assets, their claims against Southwest Next, outside the ordinary course of business in order to avoid paying BMO's attorneys' fees judgment.

**IT IS ORDERED** denying the Motion.

FILED: Exhibit Worksheet